United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7663

To be Argued by
ARNOLD C. STREAM

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

AJAX HARDWARE MANUFACTURING CORPORATION,
Plaintiff-Appellant,

v.

INDUSTRIAL PLANTS CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Preliminary Statement

This 1969 action sought the recovery of $161,895.75 in connection with a 1966 transaction.

The first trial (which followed an unsuccessful mandamus proceeding by Ajax, the appellant, to delay it) took place over a six-day period in April, 1975. The verdict rejected appellant's causes of action for contract breach and for fraud, but awarded appellant $70,000. on its cause of action for negligence.

Both parties having moved for judgment n.o.v. or, alternatively, for a new trial under Rules 50 and 59 of the Federal Rules of Civil Procedure, the District Judge set

aside the verdict in its entirety and directed a new trial of all issues on the ground that it reflected a transparent compromise on hotly contested issues of liability and damage. The appellant's following motion under 28 U.S.C. §455 charging "unjudicial behavior" by the District Judge and seeking his disqualification was denied.

A seven-day retrial followed in October, 1975. After both sides rested, the District Court dismissed the negligence and fraud counts. The jury rendered a verdict in favor of the defendant-appellee, Industrial Plants, on the breach of contract count. This appeal was then taken from the judgments in both trials, the intervening retrial order and the denial of the section 455 motion.

Although a dominant portion of the appellant's Statement of Issues accompanying the Appendix adumbrated attacks against "the conduct of the trial judge * * * and a deprivation of due process" [Point 1, sections (a) to (g)] along with an argument that the District Judge erroneously denied its motion under 28 U.S.C. §455 (a) [Point 3], neither point is addressed in its brief. We therefore deem them abandoned.*

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* On the other hand appellant has included in the Appendix (A-255 to A-343) a set of papers which were the subject of its motion before the District Court for leave to add them to the record. The motion was *denied* (A-337). Since those papers are not referred to in appellant's brief, we do no more than mention this, although we do question such act which in effect amounted to an arrogation by appellant's counsel of powers of reversal in disregarding that order.

Overview

At the core of these diffused legal proceedings lies a written appraisal prepared ten years ago by the appellee (Industrial Plants) at the request of the appellant (Ajax). Despite the panoply of prior proceedings, this seven-year old case involved only one central issue: What kind of appraisal did the contract between the parties contemplate? Once this question was resolved, the jury had only to determine whether Industrial prepared that kind of appraisal or breached its agreement by failing to do so.

If the jury properly arrived at a verdict on that central issue, the judgment below must be affirmed.

Nature of Action

The complaint asserted three overlapping causes of action alleged to have arisen out of the plant appraisal: contract breach, fraud and negligence. The entire thrust of the action was to establish the invalidity of the appellee's written appraisal of the fair market value of the machinery and equipment in a precision instrument plant at Strasburg, Pennsylvania, in place and ready for operation. In particular, the complaint alleges that the parties entered into an agreement under which Industrial Plants agreed to prepare an appraisal reflecting "the true market value" of the machinery and equipment (¶4 at A-7). The agreement was breached, says Ajax, because "fair market value * * * in place" was reported to be $1,056,891., whereas the "value" realized at an auction sale 14 months later was not more than $145,069. in all (¶11 at A-10, 11). The same cir-

cumstances are alleged to have reflected negligence in the preparation of the appraisal (¶15 at A-11, 12) and a fraudulent concealment of true facts (¶18 at A-12).

Apart from an intrinsic *non sequitur* in this allegation, the flaw which pervaded the appellant's case was the impossibility of equating "fair market value, in place," to the reduced sum realized in forced liquidation at a public sale, item by item, under an auctioneer's hammer. For the testimonial admissions of the appellant's own witnesses showed that a fair market value appraisal of a plant facility in place and ready for operation was entirely different from an estimate of forced liquidation values of items to be disposed of individually at public auction, and further, that the officials of Ajax clearly understood that it could not be used to forecast the latter.

As a consequence, the appellant was unable to establish reliance, causation and proximity, which led to the dismissal of the negligence and fraud counts and to the jury's verdict against it on the breach of contract count.

Summary of Appellee's Argument

1. The decision of the District Judge under Rule 59 in the first trial setting aside the verdict of the jury was within his sound discretion and should not be disturbed.

2. The District Judge properly dismissed the negligence and fraud counts upon the close of proof at the second trial.

3. There is no basis for disturbing the jury's verdict on the breach of contract count in the second trial.

4. None of appellant's other assignments of error warrants a reversal of the final judgment.

I

The Verdict At The First Trial Was Properly Set Aside

Compromise Aspects

It is a fundamental concept of American jurisprudence under constitutionally oriented concepts of trial by jury that the trial process results in dispassionate objective and independent jury methods which depend entirely and exclusively upon the merits of the case and in no way are influenced by accommodations unrelated to the record before the jurors. The principle has therefore evolved that a trial judge may never let a verdict of a jury stand if he has reason to believe that it was based upon a compromise of those independent views which should have governed its deliberations. *United States* v. *Pleva*, 66 F2d 529 (2d Cir. 1933); *Pugh* v. *Bl[illegible] City Excursion Co.*, 177 Fed. 399 (6th Cir. 1910); *Schuerholz* v. *Roach*, 58 F2d 32 (4th Cir. 1932), *cert. denied*, 287 U.S. 623 (1932); *Southern Railway Company* v. *Madden*, 235 F2d 198 (4th Cir. 1956); *National F. Ins. Co. of Hartford* v. *Great Lakes W. Corp.*, 261 F2d 35 (7th Cir. 1958); *Bass* v. *Dehner*, 21 F. Supp. 567, *aff'd*, 103 F2d 28 (10th Cir. 1939).

The finding of a District Judge that circumstances warrant setting aside a verdict and ordering a new trial deserves "considerable deference." *Reinertsen* v. *George W. Rogers Construction Corporation*, 519 F2d 531, 532 (2d Cir. 1975). The scope of appellate review is necessarily narrow, allowing for reversal only upon a clear showing of an abuse of discretion. *Cosentino* v. *Royal Netherlands*

SS. Company, 389 F2d 726 (2d Cir. 1968); *Hatfield* v. *Seaboard Airline Railroad Company*, 396 F2d 721 (5th Cir. 1968). The rationale for this concept is that the trial judge is in the best position to decide the motion on the merits and apply the governing rules so that substantial justice is done on the facts of the individual case. *Legal Aid Society of New York* v. *Herlands*, 399 F2d 343 (2d Cir. 1968). If, therefore, the action of the trial court is not without support in the record, its action will not be disturbed by an appellate court. *Caskey* v. *Village of Wayland*, 375 F2d 1004, 1007 (2d Cir. 1967), citing *Neese* v. *Southern Ry. Co.*, 350 U.S. 77 (1955).

On these restrictive concepts rests the corollary that appellate courts will not review the actions of trial courts for errors of fact in granting or denying motions for new trials. *Maher* v. *Isthmian Steamship Company*, 253 F2d 414, 416 (2d Cir. 1958).

These considerations prevail, of course, in reviewing an order setting aside a compromise verdict; and where the trial judge is satisfied that the verdict reflects the improper pacification of discordant views among jurors, it is plainly within his judicial discretion (indeed, practically mandatory) for him to direct a new trial of all the issues, liability as well as damage. *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931); *Rivera* v. *Farrell Lines, Inc.*, 474 F2d 255 (2d Cir. 1973); *Caskey* v. *Village of Wayland*, *supra*, 375 F2d 1004 (2d Cir. 1967); *Schuerholz* v. *Roach*, *supra*, 58 F2d 32 (4th Cir. 1932). To be sure, in certain extraordinary circumstances dealt with later the scope of a new trial may be limited to less than all the issues raised in the case. Never, however, is this a permissible procedure where the retrial follows a trial judge's conclusion that the verdict involved was tainted by compromising features; this for the reason that the essence

of a compromise is the accommodation of some jurors who have doubts over liability by artificial adjustments of the damage claim.

The precise question was addressed in *Simmons* v. *Fish*, 210 Mass. 563 (1912), the nation's leading common law case, cited with approval by the Supreme Court in *Gasoline Products Co., Inc.* v. *Champlin Refining Co., supra*, and quoted in *Schuerholz*. Said the Chief Justice in that case (*ibid.* at 572):

> "[I]t would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new [limited] trial with the issue of liability closed against him when it appears obvious that no jury had ever decided that issue against him on justifiable grounds."

These unexceptionable principles bottom the disposition reached here by the District Court after the first trial, for the compromise nature of that verdict was transparently clear. The claim of Ajax was that the conduct of Industrial Plants caused Ajax to suffer damages in a specific dollars and cents amount: $161,895.75. The proof offered by Ajax supported this particular figure. It represented the net amount paid by Ajax to a lending bank under its guaranty of a $270,000. loan to Time & Micro Instruments (E-132, 133). The specific figure was presented to the jury by the trial judge during his charge as the maximum amount of any award by the jury (A-971). Only the briefest time was spent on this aspect; indeed, the plaintiff's only proof on the subject took the form of several documents (E-120, 122, 133, 265).

During essentially the entire course of the first trial, counsel for both sides battled exclusively over issues of

liability. The very statement of the respective contentions of the parties on the subject in the pretrial order consumed over seven pages (A-16 to A-23). We do not believe it necessary to rehearse in detail the brigade of substantial issues which were paraded before the jury during the six-day trial. They are dealt with in depth in connection with our consideration of the second trial, during which essentially the same evidence was presented.* We merely mention categorically that the proof and counter-proof on liability questions dealt with the terms of the agreement between the parties; whether Ajax received the kind of appraisal it had ordered; whether it had received the proper kind of appraisal, if a particular type had not been ordered; whether Industrial Plants had been careless in its preparation; whether the appraisal figures were accurate or inaccurate; whether Ajax was aware of the kind of appraisal it had received; *whether it relied upon the appraisal in any event;* whether it was Ajax which needed the appraisal or the lending bank; whether Industrial Plants knowingly or intentionally deceived the appellant as to its expertise or as to the utility of the appraisal it rendered; and whether any part of the claimed losses of Ajax were attributable to that appraisal.

It was therefore no surprise that the District Court, in deciding the post-trial motion of Industrial Plants and the cross-motion of Ajax, reached the conclusion that "the issue of liability [had been] strenuously contested" (A-112). It was equally predictable in the posture of the record and proof and having himself witnessed the struggles of the

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* There were two notable additions. Howard Klein, former Vice President of Ajax, appeared and testified at the second trial, and documentary proof was introduced bearing on the involvement of Ajax under a Government contract. See pp. 38-41, infra.

jurors during their deliberations* that the District Judge would as a matter of fact reach the belief that the verdict award of a neat and tidy $70,000. "was an obviously unjust and inadequate verdict" and "gives rise to the inherent inference that it is the product of a compromise" (A-112). In light of these circumstances, it became a pragmatic imperative for the trial judge then to have made the following ruling (A-114):

> "The new trial must be granted as to all issues since the verdicts as to both liability and damages are interwoven and tainted by the improper determination of the jury. The verdicts are not separable and distinct from one another. As previously stated, a compromise verdict does injustice to both parties and cannot be allowed to stand."

The compromise nature of the verdict was pointed up by the fact that the amount of damages claimed by Ajax at that first trial was liquidated and virtually unopposed; and this circumstance was a compelling factor in the decision reached by the trial judge (A-111, 112) that a compromise had tainted the verdict. See *Caskey* v. *Village of Wayland, supra*, 375 F2d 1004, 1008, note 4; *Maher* v. *Isthmian Steamship Company, supra*, 253 F2d 414, 417.

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* The jury began deliberating on April 30, 1975. It resumed the next morning. During that morning it sought and received additional instructions (on the breach of contract issue *which included the negligence theory*). By 3:00 p.m. the foreman reported to the court (E-275) that the jurors could not agree. The District Judge then summoned them into the courtroom and told them that he would not discharge them and that they were obliged to resume deliberations, suggesting that perhaps the minority could give further consideration to the views of the majority (A-992). In less than ten minutes, the jurors returned, announced a verdict with all jurors having completed a complicated special verdict form.

The appellant's response to all this is to claim that there had been no compromise because a note sent in by the jury during its deliberations shows that it had reached "unanimous agreement" in appellant's favor on all parts of the special verdict form except for Question 1.* The argument is illogical. More than that, it rests upon pure speculation. Nothing in the special verdict form signed by the jurors gives any inkling as to their adjudicative status when the note was written. Nothing is less certain or productive than attempting to fathom the ratiocinations of a jury. Cf. *United States* v. *Grieco,* 261 F2d 414 (2d Cir. 1958). It is improper to suppose that the "100% agreement" alluded to in the note (E-275) meant one thing or another. The quodlibetic argument that the expression denoted a "unanimous" determination in Ajax' favor "on at least one theory of liability" presumes that the jurors had actually answered the damage Question affirmatively. But what is there that establishes with the requisite finality that such was the case? The form shows neither strike-outs nor changes. And who can really infer from the term "100% agreement" that it did not refer to a tentative determination that there was *no* liability and no need to consider the damage Question? This enigma-wrapped riddle proves nothing at all. It certainly cannot detract from the conclusion reached by the District Judge that as a matter

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* This point was not raised by appellant in its post-trial motion. The statements in its brief that these facts were hidden from counsel by the court (Appellant's Brief, p. 32), that counsel learned of them "months after" those motions were decided (ibid. p. 18), learned of them "long afterwards" (ibid. p. 34), cannot be demonstrated in the record. Nothing indicates that the note was hidden or withheld. To the contrary, there is a clear presumption that appellant's counsel had access to the note certainly by the time it filed its motion. The pejorative assertions in the brief are therefore improper and valueless.

of fact the verdict reflected a compromise and had to be set aside.*

We call particular attention to *Grimm* v. *California Spray-Chemical Corporation*, 264 F2d 145 (9th Cir. 1959), a case with a complex of facts identical for all practical purposes to ours. In that breach of warranty case, with minimum damages of $9,919., the jury returned a verdict in the plaintiff's favor for $4,750. after a lengthy deliberation, including a report of their deadlock. The plaintiff duly moved to set aside that portion of the verdict which assessed damages, and for a new trial of that issue. The defendant cross-moved for a full retrial on grounds, *inter alia*, that the verdict reflected a compromise. A full retrial was ordered by the District Court on issues of liability and damage. In affirming that decision, the Court of Appeals wrote (p. 146):

> "As already indicated, the trial court in substance expressed the view that the verdict of the jury represented a decision on the question of liability no more than it did on the question of damages. * * * In this unusual posture of affairs we are satisfied that the court did not exceed its jurisdiction in granting a new trial on both issues."

This decision has sound precedential value and relevance to the action of the District Court in our case. That action, reflecting the trial judge's factual evaluation of what had transpired, should not be disturbed.

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* We note in passing that the trial judge found "absolutely no evidence introduced at trial to support the [amount of] the jury's award (A-112)." It remains inexplicable. See Banco Popular etc. v. Deliz, 407 F2d 1388, 1389-1390, note 2 (1st Cir. 1969), in which this fact was given weight.

The "Inadequacy" Of the Verdict

Even were we to assume that there had been no compromise presented by the jury's verdict, the decision below directing a retrial of all issues still remains legally unassailable. Although modern practice permits a partial new trial, it may not be resorted to unless it "clearly appears" that the issue to be retried is so distinct and separable that a trial of it alone may be had without injustice. *Gasoline Products Co., Inc.* v. *Champlin Refining Co., supra,* 283 U.S. 494 (1931); *Rivera* v. *Farrell Lines, Inc., supra,* 474 F2d 255 (2d Cir. 1973); *Caskey* v. *Village of Wayland, supra,* 375 F2d 1004 (2d Cir. 1967); *Schuerholz* v. *Roach, supra,* 58 F2d 32 (4th Cir. 1932). Upon the record below it cannot be said that the trial judge's conclusion, that this criterion for a limited retrial had not been satisfied and that the "inadequacy" of the award warranted a full retrial, was in any sense unrealistic, or that it was an abuse of discretion on his part to rule that "justice compels a new trial as to all issues" (A-114).

The appellant contends, however, that these general rules have no vitality where a jury uses a special verdict form and reaches a determination of liability before turning to damage questions.* The decisions do not support this reasoning. To the contrary, full retrials have been ordered in any number of cases when juries recorded improper awards in special verdicts or in answers to special interrogatories. See, e.g., *Kiff* v. *Travelers Insurance Company,* 402 F2d

* The same argument is advanced in the context of the compromise issue. The appellant says that since liability was first determined, there could have been no compromise on that issue. Nothing in the record, however, establishes that liability was determined independently of damages.

129 (5th Cir. 1968); *Hartfield* v. *Seaboard Airline Railroad Company, supra,* 396 F2d 721 (5th Cir. 1968); *Feinberg* v. *Mathai,* 60 F.R.D. 69 (E.D. Pa. 1973). The appellant claims that these cases are inapplicable because here there was "uncontroverted testimony" at the first trial showing that Industrial Plants "grossly failed to adhere to proper professional standards" (Appellant's Brief, p. 13), and that there was therefore "no dispute" over the negligence issue (*ibid.* at p 15). Of course there was. Liability for negligence was contested throughout the trial on all the issues mentioned earlier. The "gross failures" claim was frontally met by the assertion that time exigencies imposed by Ajax required short-cuts,* and by the undisputed fact that in all events *there was no evidence that the appraisal figures were incorrect or inaccurate* (A-558, 559).

Since, therefore, it was impossible to make "clearly certain" that the liability issue could be separated from the damage issue "without injustice" (*Gasoline Products Co.* v. *Champlin Refining Co., supra*), it was entirely proper for the District Judge to have ordered a full retrial. A proper regard for the interests of justice foreclosed any other alternative. *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc.,* 513 F2d 407 (App. D.C. 1975).

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* Thaler said that Klein told him he needed the appraisal quickly (Transcr. 509). Klein also impressed him with the urgency, telling him that Ajax was in process of negotiating with the Government for a fuse contract (ibid.). Thaler made the appraisal in a single day, using an appraisal done two years earlier by Hirschmann Corporation, which Klein simply told him he wanted "up graded (Transcr. 516)." Klein told Thaler he could rely on the information in the Hirschmann appraisal so as to avoid the two or three weeks it otherwise would have taken for Thaler to do a complete job (Transcr. 519). There was therefore a very real issue presented even over Ajax' "gross failure" contention.

Perhaps these considerations explain why our research has not turned up a single case in which a refusal to limit the issues upon a new trial has been successfully overturned on appeal.*

The appellant asks this Court to consider a host of cases, some of which are inapposite and the rest of which are plainly irrelevant. *Schottka* v. *American Export Isbrandtsen Lines, Inc.*, 311 F.Supp. 77 (S.D.N.Y. 1969) and others of the same genre deal with *remittiturs* where *excessive* damages are involved and liability is subsumed. Similarly, *Yates* v. *Dann*, 11 F.R.D. 386 (D. Del. 1951), *Parker* v. *Wideman*, 380 F2d 433 (5th Cir. 1967), and others of that class have no precedential values here because in all of them the factual findings of the juries on liability were not disputed by the defendants, or, as in *Devine* v. *Patteson*, 242 F2d 828 (6th Cir. 1957), involved clear and irresistible evidence of liability. *Young* v. *International Paper Co.*, 322 F2d 820 (4th Cir. 1963) is of no help to the appellant since there the parties fought over an unliquidated sum, rendering the jury's middle award rational and explainable. *Yodice* v. *K. Nederlandsche Stoom. Maat.*, 443 F2d 76 (2d Cir. 1971) is an extraordinary case where the instructions of the trial judge left the jury with an inadequate yardstick to measure damage and therefore warranted a limited retrial;† and *Mertens* v. *Flying Tiger Line, Inc.*, 341 F2d 851 (2d Cir. 1965) was sent back for a limited retrial because there had been an obvious error of law in the instructions given to the jury that the Warsaw Convention limited the jury's prerogatives as to the amount it could award.

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* See early comment to the same effect in Schuerholz v. Roach, 58 F2d at p. 33.

† Respect for the continuing impact of Gasoline Products Co. v. Champlin Refining Co. was explicitly acknowledged "on different facts." 443 F2d at 79.

No such narrow and discrete problems are found in our case.

These decisions highlight the significance of the observation made by the Court of Appeals in *Hatfield* v. *Seaboard Airline Railroad Company, supra,* 396 F2d 721, that a full retrial of all issues was particularly appropriate not only because issues of liability were strongly contested but because *neither* party urged acceptance in the trial court of the verdict finally rendered (*ibid.* at 723). That was the situation in our case.

No Additur Relief Is Available

In a Parthian shot, Ajax asks this Court to enter judgment n.o.v. for $161,895.75 upon the ground that the District Court committed "clear error" in setting aside the verdict and there was "no dispute" over the amount of damages (Appellant's Brief, p. 48). Apart from the *non sequitur* in this argument, too (the appellant *also* moved to set the verdict aside), the practice of *additur* has been severely condemned by the Supreme Court as contravening Seventh Amendment rights. *Dimick* v. *Schiedt*, 293 U.S. 474 (1935).

Subsequent attempts to use *additur* in jury cases in the federal courts have generally been rebuffed where advocated by one party or where the trial court actually conditioned denial of a new trial upon an *additur*. 6A Moore's Federal Practice, ¶59.05[4] at pp. 59-71, and cases therein cited; and *cf. United Airlines, Inc.* v. *Weiner*, 335 F2d 379 (9th Cir. 1964).

Decato v. *Travelers Insurance Company*, 379 F2d 796 (1st Cir. 1967), states a rule which simply chooses to dis-

regard the impress of *Dimick* in a situation where the jury "has properly determined liability." Apart from the fact that we believe that decision to be basically incompatible with the holding of the Supreme Court, it is inapplicable here for the reason that there was not a "properly determined liability." *Lukmanis* v. *United States*, 208 F2d 260 (2d Cir. 1953), which holds that an appellate court has the power to increase an award in admiralty, in no way affects this doctrine since there no Seventh Amendment rights obtruded.

Other Considerations

We note in passing that by our post-trial motion we also sought to set aside the verdict on Count 2 (negligence) as against the clear weight of the evidence, and for judgment n.o.v. on that count in that, as in the case of the retrial, the plaintiff had failed to prove a causal relationship between the appraisal and Ajax' claimed injury (A-75 at 82-85).* In addition, we claimed that the verdict on Count 1 (contract breach) and Count 2 was inconsistent and incompatible, so that both counts had to be retried (*ibid.* at 86-90).

Neither of these points needs be reached, if this Court leaves the action taken by the District Court at the close of the first trial undisturbed. Both points, however, are preserved since they buttress that action.

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* See discussion, pp. 22-31, infra.

II

The District Judge Properly Dismissed The Negligence And Fraud Counts During The Second Trial

Part One: Negligence

General Considerations

The appellant's negligence claim at the second trial (as at the first) rested upon two conjunctive premises. Ajax alleged first that Industrial Plants, aware of the purpose for the appraisal, had been negligent in that it provided it with the wrong kind of appraisal, a fair market value appraisal of the machinery and equipment in place and ready for operation, instead of an estimate of the sums (value) which might have been realized at a forced sale in liquidation at a public auction. It then alleged that assuming it had ordered a fair market value appraisal, Industrial Plants had been negligent in the manner in which it prepared it.

Proof failures as to critical elements of each of these aspects warranted a dismissal of the count.

Ajax Received A Fair Market Value Appraisal

First of all, we shall clear up the confusion created in the appellant's brief over the kind of appraisal which it

got, a point essential to an understanding of the position of Industrial Plants.

Industrial Plants delivered to Ajax a fair market value appraisal of the machinery and equipment, in place and ready for use and operation (E-99). It is not we who say this. The testimony, the documents and the appraisal itself establish it.

Howard Klein, Executive Vice President of Ajax, admitted it. Referring to a letter written by Norman Louis, President of Ajax, to Jesse Thaler, Vice President of Industrial Plants, the man who had done the appraisal (E-114), Klein testified as follows (A-1272 to 1274):

> Q. In [that letter] he says * * * "We would *also like for our own information* what in your opinion the equipment would bring under a forced sale." Do you see that sentence?
>
> A. Yes.
>
> Q. That is in addition to a fair market value appraisal on-site in place, right?
>
> * * *
>
> A. Forced sale is different, yes.
>
> Q. *It is a totally different animal, isn't it?*
>
> A. *Yes.*
>
> Q. *It certainly is not the appraisal you have before you, is it?*
>
> A. No.

George Sinclair, an appraiser who testified for the appellee, also acknowledged that the Industrial Plants appraisal reflected fair market value, in place (A-1455). The

appraisal itself at the last page (E-113) squarely stated that the "fair market value * * * in place" of the items appraised was $1,056,891. Finally, Jesse Thaler confirmed in a letter to Ajax (E-130) that the appraisal represented "MARKET VALUE * * * IN PLACE VALUE." And he then proceeded in the same letter to define those terms explicitly. The transmittal letter (E-96), the invoice which accompanied the appraisal (E-127) and a later dunning one (E-128) all referred to the "fair market value" appraisal.

We shall demonstrate in the next section why this single circumstance vitiated the Ajax negligence claim and the fraud count as well. For the moment, however, we only point out that the appellant's evident awareness of the basic fallacy to which we are alluding has led it to strain in its brief to show that the report also established the amount that would have been realized at a public auction sale of the machinery, item by item, in a forced liquidation of the facility. Thus, counsel point not to the appraisal itself, but instead to a single sentence in each of two writings *dehors* the appraisal which they claim were part of the appraisal and supplied this additional data. One was merely a letter of transmittal (E-96) in which Thaler made the statement that "market values of used machinery" for the next two years would not be less than 60% of the appraisal rendered. The other writing that they point to is a preliminary telegram (E-59) which Thaler sent to Ajax in advance of the formal appraisal, and contained the same sentence.

In the first place, neither the telegram nor the letter constituted the appraisal; neither was the report which Ajax paid to get (although appellant refers to the former in its brief as the "formal appraisal letter"). In the second place, to equate a reference to future "market values" to

the term "forced sale values" involves a Procrustean maiming of words and meanings that is both unnatural and unconvincing. It is not necessary, however, for us to stand upon these narrow, albeit firm, grounds; for the record below overwhelmingly demonstrates that the phrase thus employed was no more assumed to constitute a "forced sale" valuation than it was accepted as such.

Howard Klein acknowledged this when he was testifying about his telephone conversation with Jesse Thaler after he received the appraisal (A-1282, 1283):

> Q. By the way, didn't you testify yesterday, Mr. Klein, * * * that you had a telephone conversation with Mr. Thaler before you wrote that letter [dated August 29, 1966], Plaintiff's Exhibit 8?
> A. Yes, I did.
>
> Q. And didn't you say in your conversation with him, * * * "The appraisal is not completely in conformity with this assignment * * *?"
> A. Yes.
>
> Q. You didn't say it was wrong, you said "not completely in conformity," right?
> A. Yes.
>
> * * *
>
> Q. Do you remember replying as follows to that statement: *"We didn't get liquidating values,"* do you remember telling him that in that conversation?
> A. Yes.

Norman Louis, in his letter to Jesse Thaler apologizing for having imposed on him by giving such short notice

(E-114), made the following request *after* he got the appraisal:

> "You speak of the value of the equipment *and its fair market value.* * * *
>
> As Mr. Klein discussed with you, *we would also like for our own information,* what in your opinion the equipment would bring under a forced sale."

Howard Klein followed up with a letter of his own a few days later (E-115), in which he made a similar request, thereby confirming what the appraisal was not: it was not a forced liquidation appraisal.*

There is thus no escape from the fact that these two sophisticated businessmen well knew the vast difference between a fair market value of machinery and equipment in place and ready for operation on an integrated basis, on the one hand, and the amount which might be expected to be realized at a forced sale in liquidation, item by item, under an auctioneer's hammer. Their letters proved this. Klein could not have made the point clearer when he said that a fair market value appraisal "was an entirely different animal" than a forced sale appraisal (A-1272 to 1274).

Having thus demonstrated that what Ajax got, what its officials knew it got and what Ajax paid for was a fair market "in place" value appraisal, we now consider how that circumstance destroyed the appellant's negligence count and justified its dismissal by the District Judge.

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* See also Klein's letter of October 5th (E-129), containing his express recognition that the appraisal showed "replacement cost" and not values at a forced liquidation sale under an auctioneer's hammer.

The Absence Of The Causation Factor

It is axiomatic in our jurisprudence that liability for a wrongful act can only attach when the wrong is the direct and proximate cause of the injury for which redress is sought. "The law," wrote Judge Cardozo, "solves these problems pragmatically." *Bird* v. *St. Paul F.&M. Insurance Co.*, 224 N.Y. 47 (1918). It is not enough that an injury be caused, it must have been a proximate consequence of the objectionable act (*ibid.* at 54). "It is," wrote the Court of Appeals of New York on an earlier occasion, "the natural and proximate loss [for] which the plaintiff is to be indemnified." *Wright* v. *Bank of the Metropolis*, 110 N.Y. 237, 249 (1888).

It is in this critical respect that the appellant's entire case crumbled; for the undisputed testimonial evidence and documentary proof showed that the loss, if any, which Ajax suffered on its loan guaranty did not flow from the appraisal and was not the proximate consequence of that report.

Stated in a nutshell, the fair market (in place) value appraisal was of no use in determining possible prices realizable at an auction sale in forced liquidation of the machinery and equipment involved. The officials of Ajax knew this from the time they received it, and knew also that they could not rely upon it to aid them in the latter connection.

Mr. Sinclair himself admitted this. The following testimony of this witness is illuminating (A-1458 to 1459). It took place in the context of a comparison of the Industrial

Plants appraisal with one which Sinclair had previously done for a client of his own.

Q. And this fair market value appraisal that you prepared is item by item, isn't it?" Yes or no?

A. Yes, sir, it is.

Q. And so is that one before you, Plaintiff's Exhibit 6, right?

A. Yes, sir.

Q. And entirely different, Mr. Sinclair, from an appraisal of a fair market value in-place is an appraisal of liquidating values for a sale under orderly conditions, isn't that right?

A. Yes, sir.

* * *

Q. Fair market value on site—it can't serve for liquidating values connected with a forced sale, can it?

A. No.

Q. And an auction is a forced sale, isn't it?

A. There are two types. Some auctions are forced sale, some orderly auction sales.

Q. Orderly auction sales and forced auction sales?

A. Yes, sir.

Q. How about the foreclosure of a mortgage lien and a sale under an auctioneer's hammer in liquidation of a plant?

A. That is what I would classify as a forced sale.

Q. *And this appraisal, Plaintiff's 6, couldn't possibly be used to forecast those values, could it, yes or no?*

A. *Not to my knowledge, no sir.*

Nor was that all there was in the record on the subject. It developed during the appellant's case that the very financing transaction which counsel suggests was the reason for the appraisal *was actually consummated before the appraisal was received.* The Ajax-Time & Micro agreement, in which Ajax agreed to lend or guarantee up to $350,000., was dated August 18, 1966 (E-60). The appraisal was not completed until Friday, August 19, 1966. It was not received in Los Angeles until the following Monday, August 22nd (A-1266).

Appellant's answer is that it "relied" upon the preliminary telegram. The short answer is that there is no proof in the record that it was even received before the contract closing (A-1248). Norman Louis was the only Ajax official at that closing, and he did not testify. In any event, Howard Klein unwittingly exploded that contention. He testified that what he had needed for his company was "an itemized appraisal of each piece of equipment and *not* an appraisal of the entire unit value as a watch manufacturing plant (A-1224)." The telegram of course never filled that bill, and neither did the transmittal letter. The clincher turned out to be the Ajax-Time & Micro contract itself, for attached to it was not the Industrial Plants appraisal but an appraisal prepared two years earlier by another company.*

The record contains even more than that. After the $1,056,000. fair market value apraisal was received, Ajax officials negotiated with Sidney Kriser of Industrial Plants to acquire the right to "put" the plant to the latter company within 18 months for only $350,000. and allow Indus-

* It had been prepared by Hirschmann Corporation and given by Klein to Thaler to help him in doing his own appraisal for Ajax (A-1599). Compare Thaler's copy of it (E-3 to E-57) with the copy attached to the Ajax-Time & Micro contract (E-69 to E-95).

trial Plants to auction it off for its own account (E-117, 129). This of course would have provided them with full insurance against loss on the $270,000. Time & Micro guaranty. That Ajax chose not to close this deal is irrelevant. The transaction brings out clearly that Ajax, when considering liquidating values, gave no weight to the fair market value appraisal of $1,056,000., and certainly never relied upon it. Otherwise, why seek the insurance of a "put?"

The reliance-causation argument capsized under the cumulative weight of all these circumstances and finally sunk under the pressure of Klein's two letters to Jesse Thaler. In one, written a week or so after the appraisal was received (E-114), he explicitly noted the distinction between the fair market value appraisal and liquidation values. In the other, written in October (E-129), he flatly stated that, fair market value notwithstanding, "the forced liquidation value should be no more than $450,000. * * *." And he used that conclusion as a predicate for seeking to lower the appraisal fee to a percentage of that lesser amount.*

Since there was not a scintilla of credible evidence of any reliance by Ajax on the appraisal but rather overwhelming indications that it knew that it could *not* rely upon the fair market value appraisal for forced sale values, Ajax failed entirely to meet its burden of proving causation: that the fair market (in place) value appraisal was the proximate cause of its loss (if any there was) on the forced sale at public auction fourteen months later. See

* These considerations are in addition, of course, to the square admissions of non-reliance made by Klein during the trial, when he acknowledged first that the appraisal he got was a "totally different animal" (p. 18, supra) than a liquidating value appraisal, and then, that Ajax *never received* (p. 20, supra) liquidating values.

Craig v. *Anyon*, 212 App. Div. 55 (1st Dept. 1925). The District Court properly took the negligence issue away from the jury for this reason. *Balfe* v. *Kramer*, 249 App. Div. 746 (2d Dept. 1936).

The fact that the District Court in dismissing the count adverted to other circumstances does not derogate from the validity of its action. If its decision is supportable under any theory, whether or not expressed, it will not be disturbed upon appellate review. *Helvering* v. *Gowran*, 302 U.S. 238 (1937); *Griggs* v. *Duke Power Company*, 515 F2d 86 (4th Cir. 1975).

As a practical matter, as the trial judge pointed out in his oral decision (A-1755), the dismissal in no way prejudiced Ajax, because the same negligence issue was left to the jury as an adjunct to its consideration of the contract breach count.* The verdict of the jury on the latter count finally laid the negligence theory to final rest.

The Absence Of Proof Of Appraisal Error

The appellant's brief recites in exhaustive detail the various respects in which the Industrial Plants report was said to be lacking from the viewpoints of appraiser George Sinclair and Arthur B. Sinkler, formerly President of Hamilton Watch Company.

Sinclair's tabulation of deficiencies, however, established nothing more than what in his private opinion amounted to variations from *his* views of acceptable procedures and reporting forms. Procedures and formalities to the side, he was unable to state that the ultimate appraisal was in

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* See the Trial Judge's instructions on the matter quoted at p. 35, infra.

error or that value assigned to the machinery and equipment in place was inaccurate in a single respect.

The following example from Sinclair's testimony illustrates this (A-1428 to 1430).

"Q. * * * [If] an appraisal doesn't, by way of example, set forth the serial numbers of the component units of the plant and equipment being appraised, does that omission, in your opinion, represent a variance from sound and accepted appraisal practices?

A. Yes, it does.

Q. Is it a serious omission, sir?

A. No, it's a lack of professionalism.

Q. But does it in any way negate the validity of the figures themselves in the report?

A. Not necessarily.

Q. And how about the statement of general condition? I think you testified that it didn't conform to sound and accepted appraisal practices for the appraisal of Industrial Plants to have neglected to set forth the general condition of each item next to the item, isn't that what you said?

* * *

A. Yes, sir, that is what I said.

Q. That was a deficiency, right?

A. Yes, sir.

Q. Does it necessarily affect the validity of the dollar figures in that report?

A. Not necessarily.

Q. Does it mean the figures are wrong?

A. It doesn't mean they are right, no, sir.

Q. Does it mean they are wrong?
A. No, sir.

Moreover, Sinclair disclaimed any intention on his part to impeach the accuracy of the appraisal. Referring to certain written standards of the Appraisal Association of which he was a member, he said (A-1454):

Q. The fact that those standards are not observed doesn't necessarily destroy the accuracy of the figures, does it?
A. No, sir.

Q. Say it loud.
A. No, sir.

Q. You can't in any way express any opinion concerning the accuracy or the inaccuracy or the validity or invalidity of any one or more figures in the appraisal which Industrial Plants did in this case for Ajax, isn't that a fact?
A. I never examined the figures.

Q. *You can't state an opinion one way or the other?*
A. *I cannot.*

Mr. Arthur B. Sinkler was equally unable to discredit any part of the fair market valuation assigned to the Time & Micro uipment. His testimony dealt largely with world market conditions and the state of the market with respect to a forced sale on an item by item basis (A-1679-1680; 1687-1688), all extraneous considerations in the context of a valuation which assumed a sale of the plant in place and intact. He was fuzzy about the chances of an "in

place" sale under orderly conditions.* He was certain of one thing. He could not state that the valuation of Industrial Plants was inaccurate in a single particular. So his testimony was of no value to Ajax. It was of benefit to the appellee. Sinkler disclosed that Hamilton Watch had closed in 1967 (A-1680-1681) and he had eventually sold *its* plant intact and in place to the United States Government as a fuse-making plant. Time & Micro could have been disposed of in the same fashion.

That these paid experts opined that Industrial Plants had disregarded certain reporting procedures† did not shore up the fatal deficiency in appellant's proof. Not a word appears in the entire record to show that a single figure in the appraisal was false or wrong or inaccurate. The ultimate valuation remained intact. And of course, the amounts realized at the auction sale held some fourteen months later, when the Time & Micro plant was liquidated and the machinery sold item by item as second hand pieces to be carted away, in no way impugned the validity of the earlier appraisal of that plant, in place, ready to operate intact.

The Government Contract

All these circumstances lead one to inquire, what was it that led the company to guarantee a $270,000. loan to Time & Micro and what did Ajax really rely upon in so doing? The answers to these questions are also in the record.

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* Chances poor, he said at one point (A-1680); he didn't know he said at another time (A-1687).

† Sinclair grudgingly conceded that the business exigencies which led Klein to insist that the appraisal be done post-haste superseded his procedural "musts" and were factors entitled to be considered (A-1464-1465).

The initial interest of Ajax in Time & Micro stemmed from an opportunity to utilize the latter's high pr ision watch-making machinery in the making of timing d ices for fuses under a United States Government contract. By August, 1966, Ajax had been awarded (although it had not yet signed) a $3,500,000. Government contract engaging it as the general contractor for a munitions fuse program. It was actually signed by the parties on October 19, 1966 (see reference to date at E-202). The Time & Micro high precision facility was an essential ingredient, and Ajax proposed to engage it under a subcontract (A-1162).

With those rosy prospects at hand, the first thing that the Ajax officials did was to negotiate a joint venture agreement with Time & Micro which also afforded them the opportunity to acquire a 50% equity interest in that company (A-1182; 1192-1193). Thus reinforced, Ajax officials were ready to assist Time & Micro in achieving sufficient financial independence to qualify for that subcontract. The furthest thing from their minds at that time was a sale of Time & Micro "on the auction block (A-1193)." The outcome of this was the agreement of August 18, 1966 which reflected the undertaking of Ajax either to lend or guarantee not more than $350,000. to Time & Micro. In September, Ajax opted to guarantee the loan, reduced to $270,000., and signed appropriate papers with First Western Bank (E-120; 122).

At the same time (hardly a coincidence), Ajax became a party to a $3,518,000. Government fuse contract, with profits expected to amount to not less than $350,000.* not to mention the additional benefits to be expected under the joint venture arrangement. On December 13, 1966, Ajax "awarded" Time & Micro a subcontract to make the timing devices for the fuses (A-1322).

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* Calculated at 10% of the gross proceeds. See E-190.

That Ajax relied upon this Government deal rather than upon the Industrial Plants appraisal report is confirmed by the fact that the agreement between Ajax and Time & Micro was revocable by Ajax at any time upon payment of a small penalty sum. Thus, it did not put itself on the hook until October when, ready to sign a $3,518,000. Government contract, it saw no risk in assisting its prospective subsidiary-joint venturer, and signed the bank guaranty.

These, we say, were the real circumstances which impelled Ajax to finance Time & Micro. The prospects which this opportunity presented constituted the causation factor behind the guaranty, not the appraisal by Industrial Plants. The lending bank may have required it to support its chattel mortgage (E-122), but nothing in the record diminishes the unremitting weight of this additional evidence which destroyed the reliance and causation factor as to Ajax as a matter of law, and fully warranted the dismissal below.

Part Two: Fraud

The Fraud Count Should Have Been Dismissed

All of the factors which supported the dismissal of the negligence count apply equally to the dismissal of the fraud count. Whether called causation in connection with the negligence court or reliance as to the fraud count, the record is barren of any evidentiary basis allowing this issue to be submitted to the jury. If the appraisal was not relied upon—and it surely was not—it makes no legal difference whether it was prepared fraudulently or negligently. (Neither assumption, of course, was established.) It cannot be the nexus for a recovery.

An additional consideration is present in connection with the fraud count. One of the essential ingredients of a fraud case is *scienter*. The appellant, recognizing this, alleged in its complaint that when Industrial Plants represented to it that it would make a careful, accurate and skillful appraisal, "it did not intend so to perform." (¶ 18 at A-12.) There was not a scintilla of proof to that effect in the record.

The allegation itself, conclusory in form, was probably legally insufficient from the outset. But in the state of the record, the dismissal of the fraud count and of the appellant's accompanying demand for punitive damages was entirely proper.

III

The Jury's Verdict Was Entirely Proper

General Considerations

The count alleging contract breach was submitted to the jurors and a verdict was rendered thereon in the appellee's favor. The complaint was anything but a model of clarity in its statement of this cause. To begin with, it alleged (¶ 4(a) at A-7) that Industrial Plants agreed to appraise the Time & Micro machinery and equipment—

> "* * * and to advise and report to [Ajax] the true market value thereof."

It further alleged (¶ 5) that Industrial Plants had agreed to conduct the appraisal "in a careful, accurate, skillful, diligent and industrious manner."

The breach which the pleading charges was then stated as follows (A-10, 11):

> "11. *Defendant's breach of contract.* In its appraisal of the machinery and equipment of Time & Micro and in making its report to plaintiff on or about August 17, 1966, as aforesaid, defendant breached its contract to make a true and accurate appraisal for plaintiff, and its obligation to plaintiff to make such appraisal in a thorough, diligent, prudent, careful, and accurate manner, having in mind the particular purpose for which defendant sought said appraisal, in that it rep-

> resented that the 'fair market value' was $919,085, that the 'in-place value' was $1,056,891, and that it was 'inconceivable' that a sale held within two years would produce 'less than 60% of those figures, when in fact the value of virtually all of the said machinery and equipment was not more than $145,069.00.' "

It is doubtful whether this allegation even constitutes a statement of a legal claim. It is vague, it is illogical, it is conclusory. It states no act constituting a breach of a discrete contract provision.

Probably mindful of this, the appellant attempted to correct the situation in the statement of its contentions in the pretrial order. Thus, the appellant claimed a three-prong breach by Industrial Plants. First, it claimed that (despite the contrary allegation in its complaint) Industrial Plants was to pick out the proper kind of appraisal but breached the agreement by selecting the wrong one.* Second, Ajax contended that the appellee had specifically agreed to render a liquidation value appraisal but breached that agreement by delivering a fair market value appraisal. Third, it charged that Industrial Plants had agreed to do its work carefully and skillfully (i.e. not negligently) and failed to do so.

The District Court's Charge Was Proper

All these contract theories were referred to in careful, explicit instructions given by the Trial Judge to the jury at the close of the case (A-1915 to 1917). Indeed, the

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* The Complaint alleged that the parties had *agreed* to a "true market value" appraisal.

Court went to great lengths to explain the third contract (negligence) theory (A-1917 to 1918):

> "If you find that the plaintiff asked for and received a forced sale liquidation sale value, then you will consider whether or not this contract was breached by any failure of the defendant to prepare the appraisal with care, skill and accuracy reasonably to be expected under the circumstances, mindful of the exigencies reflected by the evidence as to the time as of which the plaintiff requested the appraisal.
>
> • • •
>
> "Any appraiser, I charge you, by virtue of his po ition as an expert in the field of appraisal and his contract of employment is expected to exercise the care and competent responsibility expected of persons in his profession in the performance of the contract under the terms and conditions thereof. He must adhere generally to accepted professional standards in carrying out his duties under this contract. The services of an expert are sought because of their special skill. If he fails to perform in accordance with these standards he may be liable for breach. He must perform the thing agreed to be done with the care, skill and faithfulness required under the entire circumstances of the contract and a willful or negligent failure to do so might be a breach of contract."

In our respectful opinion, the appellant was given the greatest latitude imaginable in presenting its case for breach of contract. It was freed from the strictures of its own complaint. It was allowed to introduce evidence and argue on an assortment of theories of its own choosing.

It was allowed to go to the jury on all of them.* And the jury rejected them all.

The District Judge properly instructed the jurors (A-1915, 1916) that it was their sole province "to determine from the evidence * * * what the terms of the agreement were as made on or about August 12, 1966, between plaintiff and defendant." It was incumbent upon the Court, however, to instruct the jurors that if they concluded that a fair market value appraisal had been ordered and had been delivered, the case ended there. And the Court did exactly that, explaining its reasons in terms of the missing reliance-causation factor (A-1916, 1917):

> "If you find that the plaintiff asked for a fair market value appraisal only and that defendant delivered a fair market value appraisal, then you must find for the defendant as to the question of breach of contract. The evidence clearly shows that an appraisal for fair market value is completely different from an appraisal of liquidating values or at a forced sale. Therefore, a fair market value appraisal could not be used or relied upon in connection with any forced liquidation sale."

The matter did not end there. There remained the open question whether Ajax ordered, or Industrial Plants was called upon to deliver, a liquidation value appraisal. And that, too, was explicitly put to the jurors in the Court's

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* We think the Trial Judge could have eliminated the first and the third because, having received a fair market value appraisal, the inability of Ajax to bridge the reliance-causation factor eliminated them as actionable theories. The second contract theory, if sustained by the jury, would have limited the appellant's damages to the amount it paid for the wrong appraisal. The verdict, however, rendered these considerations academic.

charge; and the jurors were further informed in that connection that if their determination was affirmative, they could conclude that the appellee had breached its agreement, because that kind of an appraisal was not delivered (A-1917).

The Court even allowed the jury to decide whether the appraisal delivered was in fact a liquidation value appraisal and in that context, and only that context, the members were instructed on the negligence aspects of the breach of contract count; for in that case the causality factor would have become operative.

We respectfully submit the view that there was no error in this portion of the charge given by the District Court. Appellant's suggestion that the charge should have been couched in mandatory terms in dealing with the negligence aspects of the breach of contract count is without merit. In our view, the Court adequately covered the point and placed the appellant's case in a fair light.

The Special Verdict Form Was Proper

The special verdict form pinpointed the issues connected with the surviving breach of contract count.

The first question was cast squarely in terms of the appellant's claim. It called for a consideration of the pivotal question as to the kind of appraisal which the parties' agreement contemplated. It even went so far as to adopt Ajax' theory in its statement so that an affirmative answer would have confirmed the appellant's case. Thus, the jurors were asked whether Ajax had proved that Industrial Plants had undertaken to render "a forced or liquidation sale" appraisal.

The second question could become viable only if the jury decided that Industrial Plants should have or had prepared a liquidating value appraisal; this for the reason, as we pointed out before, that if Industrial Plants had been expected to deliver a fair market value appraisal, there was no case left for Ajax, for the record established beyond doubt that a fair market value appraisal was in fact prepared and could not be equated to a forced sale valuation. If, however, the jury had concluded that Industrial Plants should have prepared a liquidating value appraisal, only then would the jury have proceeded to this second question, which called upon the members to decide if Industrial Plant had breached its agreement. In that connection the jury could have found affirmatively for Ajax on contract breach upon the ground that the appellee selected the wrong appraisal or prepared it carelessly, improperly or unskillfully (i.e. negligently).

These two questions, we say, placed the trial issues before the jury with unexceptionable clarity. Consideration of damages was deferred, as it should have been, until the resolution of these substantive issues.*

References To The Government Contract With Ajax Were Entirely Proper

The appellant contends that references during the second trial to dealings between Ajax and the United States Government were irrelevant and therefore "fatally prejudicial," requiring a third trial. We submit that those references were to matters relevant to the issues.

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* In the state of the record, given the fact that the appraisal was of fair market value and therefore not of use for other purposes, the only damages which Ajax could have suffered was the fee it paid to Industrial Plants for the wrong appraisal.

We have already shown that not only did Ajax completely fail to establish that it relied upon the appraisal involved or that that report was in any sense the cause of its claimed damages, but we further pointed on the positive side to substantial evidence that when Ajax guaranteed the Time & Micro loan, it had been relying upon a Government contract which offered prospects of profits of over $350,000; and it had been relying further upon its joint venture deal with Time & Micro which assured it of additional profits and a major equity position in that valuable plant operation.

The pendency of negotiations on this Government deal in the manufacture of weapons fuses in August, 1966, its consummation in October at the very time that Ajax executed the guaranty to the bank involved, and the activities of both Ajax and Time & Micro pursuant to that contract were highly relevant to the main issue of the entire case: did Ajax rely upon the appraisal when it guaranteed the loan or *was it relying on the prospect of its Government deal?* The suggestion, therefore, that any reference to that transaction lacked materiality or relevancy is without merit.

This evidence, dealing also with the payments made by the Government to Ajax in settlement of claims made upon contract termination, was proper in that respect since it had a direct bearing on the question whether Ajax had suffered damages—*i.e.* pecuniary loss—an essential element which it had the burden of showing. A defendant in an action for damages is always entitled to offer proof which, assuming or conceding the plaintiff's substantive claim, goes to reduce or mitigate the amount of the plaintiff's loss, and therefore lessen or eliminate the amount of his recovery. *Rodda* v. *Barrett*, 251 App. Div. 790 (1937);

13 NY Jur, Damages, § 148. It is not necessary to plead mitigating circumstances affirmatively. The defendant under a general denial may prove any facts which *tend* to reduce the actual pecuniary loss claimed. *McClelland* v. *Climax Hosiery Mills*, 252 N.Y. 347 (1930), 13 NY Jur, Damages, § 154.

The New York rule reflects a policy to prevent double recoveries and to avoid the unjust enrichment of an injured party. *Silinsky* v. *State-Wide Ins. Co.*, 30 AD 2d 1 (2d Dept. 1968); *Moore* v. *Leggette*, 24 AD 2d 891, *aff'd*, 18 NY 2d 864 (1966); *Szybura* v. *City of Elmira*, 28 AD 2d 1154 (3d Dept. 1967).

It was in accordance with these principles that we established that Ajax had suffered no pecuniary loss and therefore had failed to meet its burden of proof on the damage issue. Ajax contends that we proved too much, but it goes *dehors* the record in its argument. The documents *in* the record established the following:

— That on October 19, 1966, Ajax entered into a manufacturing contract with the United States Government as general contractor. (E-200.)

— That the United States Ammunition Procurement & Supply Agency planned aggregate payments under that contract of $3,518,000. (E-189.)

— That Ajax engaged Time & Micro (on December 13, 1966) as a subcontractor by telegraphic order. (E-196.)

— That the Government gave notice of termination of the contract in a writing dated December 30, 1966. (E-200.)

— That Ajax received from the United States Government on its claims in consequence of the contract termination the aggregate sum of $249,917. (E-200 at 204.)

The appellant contends that those payments should not have been brought to the jurors' attention because Ajax received the funds in behalf of itself and a host of subcontractors, including Time & Micro, and its settlement claim (E-189) of $399,678. did not in any way encompass its potential liability on the guaranteed obligation of Time & Micro. We say on the other hand that it was the exclusive prerogative of the jury to determine whether a claim of some $400,000. which included a $40,000. profit factor, filed a scant 60 days after contract engagement, did not have built-in insurance against liability on the Time & Micro guaranty. As a proper jury consideration, it was made more formidable by the total failure of the appellant to show that it had disbursed so much as a single cent from these funds to Time & Micro (which had been designated a subcontractor only a few weeks before the contract was terminated), or any other company, or to justify its own claimed expenses.

In this context we submit that this all was cogent proof properly admitted on the issue of pecuniary loss and that reference to these facts in summation was equally proper.

Even were we to assume, however, that the introduction of evidence of Government payments to Ajax as general contractor, and references to them during summation by appellee's counsel was error, it falls into the category of harmless error because no substantial rights of the appellant were affected, *Anderson* v. *Breazeale*, 507 F.2d 929 (5th Cir. 1975). Since the damage issue was never reached by the jury, a necessary conclusion to be drawn from the

fact that the basic issue of liability was resolved by the jury in favor of Industrial Plants, the harmlessness of this error is clear. *Ersler* v. *T. F. Schneider Corp.*, 188 F.2d 1022 (CA DC 1951). The possibility that the jury might have resolved the liability issue otherwise had the material objected to been excluded "is so remote that it furnishes no sound basis for revising the judgment based upon the jury verdict for the defendant and ordering a new trial." *Century Indem. Co.* v. *Davidson Transfer & Storage Co.*, 261 F.2d 690 (2d Cir. 1958).

CONCLUSION

The most remarkable aspect of the appellant's argument is what it leaves untouched, what it by-passes instead of facing. Arguments dealing with shallow procedural problems, attacks on acts which were well within the discretion of a trial judge, and shadowy suggestions of judicial impropriety in the concealment of a jury note, all divert attention from the central issue stated by us at the beginning of this brief. In short, the appellant failed to come to terms with the essential nature of the Industrial Plants appraisal. It was a fair market value appraisal, of course, of machinery in place and ready for use at its installed site. It did not reflect or foreshadow values at a forced sale in liquidation under an auctioneer's hammer.

Since the distinction was known to the officials of Ajax, the inutility of that appraisal for the latter purpose destroyed the appellant's entire case. Suffering from this vital infirmity, the appellant's cause was moribund from the outset. And it took two trials and over seven years to bring this spectral suit to an end.

In any event, despite the full array of arguments and contentions and convictions advanced by the appellant, marching off tunelessly in all directions, there emerge two main claims. One of them is the assertion that the District Judge should not have ordered a full retrial but rather should have either awarded the appellant a judgment in more than twice the amount of the verdict or limited the retrial to the damage issue. We have shown that the ordering of a retrial of all the issues was not only in the interests of justice but the kind of discretionary act which is rarely overturned by an appellate tribunal.

The second assertion is that the appellant's negligence and fraud counts should have been left to the jury for deliberation. We demonstrated that the absence of a scintilla of proof showing reliance or establishing that the acts of Industrial Plants were the proximate cause of the alleged loss by Ajax required the dismissal of those counts as a matter of law.

We therefore respectfully pray that the judgment below be affirmed.

Respectfully submitted,

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